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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 171

In the Matter of the

Application of the Village of Port Chester,
Petitioner,

To Review a Determination of

M. P. CATHERWOOD, Industrial Commissioner as to Prevailing Wages of Certain Employees of the Village of Port Chester,
Respondent,

MARTIN BUCCI, JOSEPH J. GIARARDI, *et al.*,
Intervenors-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT

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M. P. CATHERWOOD, Industrial Commissioner as to Prevailing Wages of Certain Employees of the Village of Port Chester,
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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT

The Present Petition

Petitioner, The Village of Port Chester, a New York municipal corporation, petitions for a writ of certiorari to review the decision and order of the Appellate Division of

the Supreme Court of the State of New York, Third Department, entered in the office of the Clerk of that Court on July 13, 1964, which affirmed without opinion the order and determination of the respondent M. P. Catherwood, Industrial Commissioner of the State of New York, dated October 3, 1963, purporting to determine prevailing rates of hourly wages and to hold that the claimants should have been paid by the Village in accordance therewith.

The decision of the Appellate Division is officially reported in 21 A D 2d 964.

Thereafter, by notice of motion dated August 21, 1964, the Village moved in the Appellate Division for reargument or, in the alternative, for leave to appeal to the Court of Appeals of the State of New York. The motion was denied in all respects and without opinion by order entered in the office of the Clerk of that Court on October 15, 1964. The denial has not been officially reported.

This order of the Appellate Division was never served upon the Village with notice of entry. Hence, under Section 5513(c) of the New York Civil Practice Law and Rules its time to move in the Court of Appeals for leave to appeal remained open.

Thereafter, by notice of motion dated February 24, 1965, the Village moved in the Court of Appeals of the State of New York for leave to appeal to that Court pursuant to Section 5602 of the New York Civil Practice Law and Rules. This motion was denied by the Court of Appeals, without opinion, by order dated March 18, 1965 (15 N Y 2d 485).

Reference to Opinions Below

The decision of the respondent Industrial Commissioner is on pages 35 to 38d of the Record on Review in the Appellate Division which is included in the transcript of the record in the case, duly certified by the clerk of the Appellate Division as required by Rule 21(1) of this Court. It is reproduced as Appendix B attached to this Petition.

His order and determination, with notice of entry, both dated October 3, 1963, are on pages 69-72 of the same Record and are reproduced as Appendix A attached to this Petition. *Inter alia,* it confirmed the report and recommendations of the Hearing Officer which are on pages 44 to 55 of the same Record and are reproduced as Appendix C attached to this Petition.

The affirmance by the Appellate Division was without opinion, and is officially reported in 21 AD 2d 964. Its order was dated July 2 and entered July 13, 1964.

The respective denials by the Appellate Division and the Court of Appeals of the motions of the Village for leave to appeal to the latter Court were by orders dated October 15, 1964, and March 18, 1965, and entered on said dates, respectively; and both were without opinion. The denial by the Appellate Division has not been reported. The denial by the Court of Appeals is reported in 15 NY 2d 485.

Jurisdictional Statement

The jurisdiction of this Court is invoked on certiorari under 28 U. S. C. 1257(3), because the decision and order of the Industrial Commissioner and the rulings of his Hearing Officer thereby confirmed, and the decision of the Appellate Division of the Supreme Court of New York affirming the same, deprived the Village of Port Chester, in violation of the Fourteenth Amendment of the United States Constitution, of liberty and property without due process of law.

The aforesaid order of affirmance by the Appellate Division constituted *the final judgment* rendered by the highest court of New York in which a decision could be had, within the meaning of 28 U. S. C. §1257, in view of the subsequent denial by the New York Court of Appeals of leave to appeal to that Court.

The subsequent denials by the Appellate Division and the State Court of Appeals of the motions of the Village for leave to appeal to the latter Court pursuant to Section 5602 of the New York Civil Practice Law and Rules did not constitute final judgments but were mere procedures in exhaustion of possible remedies as required by the decisions of this Court as a condition of petitioning for a writ of certiorari.

In consequence, the ninety days allowed by 28 U. S. C. §2101(c) for petitioning for a writ of certiorari to the said Appellate Division runs from March 18, 1965, the date

of the order of the State Court of Appeals denying the motion of the Village for leave to appeal to it.

American Railway Express Co. v. *Levee,* 263 U. S. 19, 20, 21;
Gorman v. *Washington University,* 316 U. S. 98, 100-1;
Department of Banking v. *Pink,* 317 U. S. 264, 268.

The Questions Presented

Subdivision 8 of Section 220 of the New York Labor Law authorizes a claimant in whose favor the Industrial Commissioner has found a differential as between his actual wage and the prevailing rate to sue his employer for recovery of the differential so found.

The questions herein presented are:

(1) Was the Village of Port Chester denied substantive and procedural due process of law by the rulings and determination of the Industrial Commissioner, affirmed by the Appellate Division, that, notwithstanding his failure to make his determination within the six months limitation prescribed by Section 220(7) of the New York Labor Law, he nevertheless had power to adjudge as against the Village successive annual separate determinations of prevailing rates of wage and consequent differing differentials in twenty-seven different occupations for each of the subsequent *thirteen years,* and to do so even in the absence of filed claims alleging the varying factors relevant to differentials for each of seventy claimants in each of such succeeding years?

(2) Was the Village denied substantive and procedural due process of law by the rulings and determination of the Industrial Commissioner, affirmed by the Appellate Division, that, in the absence of verified complaints for the succeeding years, and in disregard of the Village's demand for bills of particulars for those succeeding years, nevertheless imposed successive annual liabilities for annually varying differentials against the Village for each year of a thirteen year period?

(3) Was the Village denied substantive and procedural due process of law by the rulings and determination of the Industrial Commissioner, affirmed by the Appellate Division, that he had power to adjudge *retroactively* as against the Village annual differential liabilities to fourteen new claimants for a period of over four years prior to the time when the Village was notified that they had filed claims for those years?

(4) Was the Village denied substantive and procedural due process of law by the findings of the Industrial Commissioner, affirmed by the Appellate Division, as to annual prevailing rates of wages in the twelve years after 1950, where such findings were without evidence and were mere guesswork, speculation and arbitrary conclusions?

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

Pertinent Subdivisions of Section 220 of the New York Labor Law in force in 1950 (McKinney's Consolidated Laws of New York, Book 30, Labor Law)

"3. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the prevailing rate of wages as hereinafter defined. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash; provided, however, that an employer may pay his employees by check upon a certificate of the industrial commissioner to be issued only after a hearing upon the application to pay by check, which hearing shall be with notice of at least five days to be served personally or by mail on all interested persons, or if not served as aforesaid, then to be published in a manner directed by the industrial commissioner, which shall afford interested persons the opportunity to appear and be heard at such hearing, and after proof has been furnished

satisfactorily to the industrial commissioner of the employer's financial responsibility and the employer gives assurance that such checks may be cashed by employees without difficulty and for the full amount for which they are drawn. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, sub-contractor or other person about or upon such public work, shall be paid the wages herein provided.

It shall be the duty of the fiscal officer, as defined in this section, to ascertain and determine the schedule of wages to be paid workmen, laborers and mechanics on each such public work, prior to the time of the advertisement for bids, and such schedule of wages shall be annexed to and form a part of the specifications for the work. Such fiscal officer shall file with the department having jurisdiction such schedule of wages to the time of the commencement of the advertisement for bids on all public works proposed to be constructed. The term 'contract' as used in this subdivision also shall include reconstruction and repair of any such public work.

Where contracts are not awarded within ninety days of the date of the establishment of the prevailing rate of wages by the fiscal officer, the department of jurisdiction shall request of the fiscal officer a redetermination of a schedule of wages.

Any person or corporation that wilfully pays after entering into such contract, less than such stipulated wage scale as established by the fiscal officer shall be guilty of a misdemeanor and upon conviction shall be punished for such first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor

shall any officer, agent or employee of the state, municipal corporation or commission or board appointed pursuant to law pay the same or authorize its payment from the funds under his charge or control to any person or corporation for work done upon any contract, on which the contractor has been convicted for second offense in violation of the provisions of this section.

* * *

5. Definitions.

a. The 'prevailing rate of wage,' for the intents and purposes of this article, shall be the rate of wage paid in the locality as hereinafter defined to the majority of workmen, laborers or mechanics in the same trade or occupation. In the event that it be determined that there is not a majority in the same trade or occupation paid at the same rate, then the rate paid to the greater number in such trade or occupation shall be the prevailing rate, provided such greater number constitutes at least forty per centum of the laborers, workmen or mechanics engaged in such trade or occupation; in the event there is less than forty per centum of the laborers, workmen or mechanics engaged in the same trade or occupation in the same locality paid the same rate, then the average paid to such laborers, workmen or mechanics in the same trade or occupation shall be the prevailing rate. Laborers, workmen or mechanics for whom a prevailing rate of wage is to be determined shall not be considered in determining such prevailing wage.

b. The 'locality' for the purposes of this article, shall be the town, city, village or other civil division of the state wherein the physical work is being performed.

When no workmen, laborers or mechanics of a trade or occupation for which a prevailing rate of wage is to be determined, are employed in the civil division,

other than those engaged on the public work under consideration, the locality shall be considered the first larger civil division in which workmen, laborers or mechanics of a similar trade or occupation are employed.

The first larger civil division shall be determined in the following order: (1) city or village, (2) township, (3) county, (4) the contiguous counties to the county in which the physical work is to be performed.

c. The 'fiscal officer,' as used herein, shall be deemed to be, on public work performed by or on behalf of the state or a public benefit corporation or a county or a village, or other civil division of the state, except a city, the industrial commissioner; and on public work performed by or on behalf of a city, the comptroller or other analogous officer of such city.

d. The term 'verified complaint,' as applied to a claim against a municipality, shall include a verified demand or verified notice of claim heretofore, and since the first day of January, nineteen hundred thirty-five, filed with the fiscal officer of such municipality in accordance with the provisions of the local charter or local laws or ordinances relating generally to the filing of claims or demands against such municipality; and any person who has filed such a demand or notice shall be deemed to have filed a verified complaint as of the date, not earlier than the first day of January, nineteen hundred thirty-five, mentioned in such notice or demand as the commencement of the period in relation to which such claim or demand is made.

6. The fiscal officer may, and on the written request of any interested person shall, require any person or corporation performing such public work to file with such fiscal officer a schedule of the wages to be paid to such laborers, workmen or mechanics. Any such per-

son or corporation shall, within ten days after the receipt of written notice of such requirement, file with the fiscal officer such schedule of wages.

7. The fiscal officer as herein defined may, on his own initiative, and must, on a verified complaint in writing of any person interested, cause an investigation to be made to determine the prevailing rate of wages in the same trade or occupation in the locality within the state where such public work is being performed, or the hours of labor performed by the workmen, laborers and mechanics employed on such public work, or both. The fiscal officer or his agents, examiners and inspectors may examine or cause to be examined the books and records pertaining to the rate of wages paid to the laborers, workmen and mechanics on said public work and the hours of labor performed by such laborers, workmen and mechanics on said public work. The fiscal officer in such investigation shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. Such subpoenas shall be issued and served as provided in the civil practice act and shall have the same effect as if issued out of a court of record of the state. Such fiscal officer shall make an order or determination not later than six months after the filing of such verified complaint.

8. Before proceeding under a complaint presented as provided in subdivision seven, or before making any order or determination upon an investigation made upon his own initiative, the fiscal officer shall order a hearing thereon at a time and place to be specified, and shall give notice thereof, together with a copy of such complaint or the purpose thereof, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on any person or corporation affected thereby; such person

or corporation shall have an opportunity to be heard in respect to the matters complained of at the time and place specified in such notice, which time shall be not less than five days from the service of the notice personally or by mail. The fiscal officer in such investigation shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. Such subpoenas shall be issued and served as provided in the civil practice act and shall have the same effect as if issued out of a court of record of the state. Such investigation and hearing shall be expeditiously conducted and upon such hearing and investigation the fiscal officer shall determine the issues raised thereon and shall make and file an order in his office stating such determination, and forthwith serve a copy of such order, with a notice of the filing thereof, upon the parties to such proceeding, personally or by mail. Upon the entry of such order affecting either the hours of labor or rate of wages any party to the proceeding aggrieved thereby may review the said proceedings by a writ of certiorari within thirty days from the notice of the filing of the said order in the office of the fiscal officer. When a final determination has been reached, if the determination is in favor of the complainant and involves or relates to the rate of wages paid on such public work, the complainant or any other person affected may within three months after the service of notice of the filing of said final order institute an action against the person or corporation found violating this act for the recovery of the difference between the sum actually paid and the amount which should have been paid as determined by said final order, from and after the date of the filing of said verified complaint or of filing report of investigation made on his own initiative with the fiscal officer as hereinbefore provided."

Since 1950 there have been some textual amendments of the above subdivisions. None of the amendments makes changes now pertinent. They are all listed in the footnotes to Section 220, McKinney's official publication of the Labor Law.

Concise Statement of the Case

(1) In public employment Subdivisions 7 and 8 of Section 220 of the New York Labor Law required an employee who claimed that his wage was less than the prevailing rate, to file with "the fiscal officer" (in this case the Industrial Commissioner of the State), "a verified complaint in writing." Thereupon the fiscal officer was required to "order a hearing thereon" and to "give notice thereof, together with a copy of such complaint or the purpose thereof" to "the person or corporation affected thereby" who "shall have an opportunity to be heard in respect of the matters complained of".

Subdivision 7 added the specific additional requirement:

> "Such fiscal officer shall make an order or determination not later than six months after the filing of such verified complaint."

Subdivision 8 added the further specific requirement:

> "Such investigation and hearing shall be expeditiously conducted and upon such hearing and investigation the fiscal officer shall determine the issues raised thereon."

Subdivision 8 also provided that, if the differential found by the Industrial Commissioner were not paid with-

in three months after his order, the claimant could institute an action in the New York Supreme Court for the recovery thereof.

(2) Under this statute fifty-four claims were filed with the Industrial Commissioner in May, 1950; two more in February, 1951; and allegedly fourteen more by new claimants in February, 1957,—a total of 70 claimants (101, 364). These claimants worked at 27 different occupations (176).*

Nevertheless no hearing on the fifty-four claims filed in 1950 and 1951 was even scheduled until December 19, 1956 (15). That initial hearing consisted solely of colloquy between the Hearing Officer and counsel (84 *et seq.*).

The second hearing of the eleven hearings was not held until September 7, 1961—nearly five years after the first hearing (100).

Mr. Schmidt, counsel for the Village, stressed that there had been a failure to follow the statutory procedures; stressed that there had been failure of due process of law both substantively and procedurally under both the federal and state constitutions; and asserted laches as a further defense.

The Hearing Officer stated that he would "reserve decision" on Mr. Schmidt's motions and objections, and directed that the hearing proceed to testimony (110). Stipu-

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* The numerals refer to pages in the Record on Review before the Appellate Division, included in the transcript of the proceedings in that court certified by the clerk thereof pursuant to Rule 21 of this Court.

lation was made that Mr. Schmidt's further participation would not "be considered a waiver" (110).

The hearings then dragged on for one year and six months more—the last being held on March 6, 1963 (357).

Thus the total time consumed in the eleven hearings was six years and three months.

Seven months after the last hearing, and more than thirteen years after the filing of the first fifty-six claims, the Hearing Officer made his report to the Commissioner dated October 3, 1963 (44-55),—Appendix C hereto annexed.

The report overruled Mr. Schmidt's objections and contentions continuously pressed during the hearings (specifically including his contentions as to "denial of due process of law" (49)).

The report concluded with a finding of "prevailing rates" and annexed Schedules C to D-1 showing as to each of the 70 claimants in the various occupations the annual differentials from the year of the filing of their respective claims beginning with 1950 to 1963 inclusive (44-69).

On the same day (October 3, 1963) the Commissioner made a determination concurring in the report and repeating verbatim its findings (69-71),—Appendices A and B hereto annexed.

Thus, between the filing of the 56 claims in 1950-1 and the Commissioner's determination of them in 1963 there elapsed more than thirteen years.

Specific References in the Record to the Federal Question

At the second hearing before the Industrial Commissioner's Hearing Officer (September 7, 1961), the first hearing having been mere colloquy (84), Mr. Schmidt, in defining his positions, said (104):

> "Now, I have another set of objections based upon the statute itself, that is to say the failure to comply with Section 220 and that in turn means failure of the procedural due process under *the fourteenth amendment* to the United States Constitution, to say nothing of the New York State Constitution." (Emphasis ours.)

In reply Mr. Harold, the attorney for the claimants, said (p. 107):

> "In respect to the reference to the Fourteenth Amendment, I pass it by until I have a further development in the long brief I am sure. As to why the Fourteenth Amendment has any particular application to this proceeding I assume, as I know that we will be successful, at least in this Department and lower courts as to what Mr. Schmidt means when we get to the United States Supreme Court."

And later in the same second hearing Mr. Schmidt further said (p. 109):

> "Finally, I say the Fourteenth Amendment is always involved when there is a failure of due process either procedural or substantive and here there is a failure of procedural due process. They did not follow the statutory procedures. The Industrial Commissioner has not done so to date and I am taking advan-

tage of that. That is why I raised the Fourteenth Amendment."

At the hearing on June 6, 1962, Al Capuano, chief investigator in the State Labor Department, presented findings as to prevailing rates for the entire twelve years from 1950 to 1961. Mr. Schmidt contended that the complaints filed in and for 1950-1 did not justify making findings as against the Village for each successive year for twelve years thereafter. The Hearing Officer overruled this contention in the following colloquy (p. 216):

"Mr. Schmidt: * * * I can only guide myself by the complaints as they were given to me. The complaints that were given to me concern 1950 and 1951. Is that complaint being construed by the Department as a challenge of the rates paid ever since 1951 to the present date (1962)?

Comm'r Dahmen: Yes, I think that is the law, Mr. Schmidt."

Later at the same hearing Mr. Schmidt said (220):

"Mr. Schmidt: Well, then I would now like to get a bill of particulars and I would like the Department to order such a bill of particulars to be produced showing what is the claimed liability. After all that is something that my client is entitled to know—what is the claimed liability. As I said my client disclaimed any knowledge of anything from the 1957 complaints, but now I want to have the claimed liability for this entire period so that I can produce my legal arguments to the claim as made."

And later at the same hearing Mr. Schmidt said (235):

"Mr. Schmidt: Well I would just like to be heard very briefly. If it were as simple as that every em-

ployee should simply at the beginning of his employment file a complaint and forever afterwards no other complaint must be made. If he decides to file it in 1950, it applies in 1979. I don't think a law was ever written to cover any such charge. I don't know what they are claiming but the person against whom a claim is made wants to know what is being claimed. *This is the very essence of due process in a hearing.*" (Emphasis ours.)

At the sixth hearing (July 2, 1962) Mr. Schmidt established that until the preceding June none of the officers of the Village had any knowledge that fourteen new claimants had filed claims with the Industrial Commissioner five years previously, to wit, in January 1957 (264-5, 372). Mr. Schmidt added his own personal disclaimer of knowledge (269).

The report of the Hearing Officer expressly recognized that the constitutional issue of due process had been squarely and fully raised and briefed before him, for in Subdivision III it recited (49) (Appendix C hereto annexed):

> "It is the contention of the Village that failure to follow the procedures required by Section 220 when determining a prevailing rate of wages amounts to *a denial of due process under the 14th Amendment.* Its Counsel stated as follows:
>
> 'Mr. Schmidt: Now, I have another set of objections based upon the statute itself, that is to say the failure to comply with Section 220, and that in turn means failure of the procedural due process under the fourteenth amendment to the United States Constitution, to say nothing of the New York Constitution * * *.'" (Emphasis ours.)

In the petition of the Village for a review by the Appellate Division of the order and determination of the Industrial Commissioner pursuant to Article 78 (Sections 7801-6) of New York Civil Practice Law and Rules, the petition alleged (18):

> "23. Petitioner had argued that the Industrial Commissioner in thus proceeding to further hearings was about to proceed without or in excess of his jurisdiction and in violation of law and due process; * * *."

In its brief in the Appellate Division the Village said (p. 17):

> "As a result of this colloquy, counsel for Petitioner asked for a bill of particulars detailing the precise nature and amount of the claims presented by complainants against the Village of Port Chester. The Attorney for the Union and for the claimants opposed this on the ground that it would delay the proceedings (235). Mr. Schmidt answered in part, raising a question of *constitutional due process*:
>
> > 'If it were as simple as that, every employee should simply at the beginning of his employment file a complaint and forever afterwards no other complaint must be made. If he decides to file it in 1950, it applies in 1979. I don't think a law was ever written to cover any such charges.' (235)."
>
> (Emphasis ours.)

In his affidavit moving the Appellate Division for reargument or for leave to appeal to the Court of Appeals, Mr. Schmidt said (p. 2):

> "7. I respectfully submit, in addition, that it (the Village) is at least entitled to hearing, or trial, before the Supreme Court of the State of New York in and for the County of Albany, on the following questions:

(1) Whether the Industrial Commissioner had failed in the premises to perform a duty enjoined upon him by law; especially the Constitutional requirement to provide *procedural and substantive due process* and a fair hearing, as well as a just determination based on evidence in the record;

* * *

(3) Whether the determination made by the Industrial Commissioner was in violation of lawful procedures, was affected by error of law, and was arbitrary and capricious as well as an abuse of discretion, largely because of failure to comply with the requirements of §220 Labor Law, of Constitutional provisions for fair and full hearing and for *procedural and substantive due process.*" (Emphasis ours.)

In its brief in the State Court of Appeals moving for leave to appeal, the Village stressed its constitutional contentions now embodied in "The Questions Presented" (*supra*) and in Points I to IV, *post.* See pages 16, 17, 28, 34-5, 36, 38, 40 thereof.

POINT ONE

The Village of Port Chester was denied substantive and procedural due process of law by the rulings and determination of the Industrial Commissioner, affirmed by the Appellate Division, that, notwithstanding his failure to make his determination within the six months limitation prescribed by Section 220(7) of the Labor Law, he nevertheless had power to adjudge as against the Village successive annual separate determinations of prevailing rates of wage and consequent differing differentials in twenty-seven different occupations for each of the subsequent *thirteen years*, and to do so even in the absence of filed claims alleging the varying factors relevant to differentials for each of seventy claimants in each of such succeeding years.

(1) In *F. T. C.* v. *National Lead Co.*, 352 U. S. 419, this Court said (p. 427):

> "It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them. *Morgan* v. *United States*, 304 U. S. 1 (1938)."

See also *Willner* v. *Committee on Character*, 373 U. S. 96, 105; and *Gonzales* v. *United States*, 348 U. S. 407.

The violation in this case of this essential and basic constitutional principle presents, we submit, special and important reasons for review by this Court not only because the result below purported to impose on this Village a disastrous liability for over $328,000 but also because it sets a precedent for like violations in the constant adminis-

tration of the New York Labor Law and of its counterparts in the many states which have enacted duplicate or like legislation.

(2) Fifty-four verified claims were filed with the Industrial Commissioner in May, 1950, and two more in February, 1951 (278, 368-71). They represented twenty-seven different occupations (176).

Each of these claims was on its face confined to a particular rate of pay applicable, necessarily, to a particular time; and each was in identical form as follows (368):

> "I am now employed by the Village of Portchester as a Laborer (Civil Service Title) Sanitation (Department of Village).
>
> I am paid at the rate of $9.00 per day.
>
> It is my belief that my proper wage for this work is $13.08, and that I am thus paid less than the prevailing rate.
>
> I respectfully request that you make an investigation and hold hearings to determine the prevailing rate of wages to which I am entitled pursuant to Section 220 of the Labor Law of the State of New York."

On the filing of these claims the Industrial Commissioner was required by Section 220(7) and (8) of the Labor Law "expeditiously" to conduct an investigation and order a hearing, and to render his determination not later than six months after the filing of the claim.

At the hearing on June 6, 1962, Mr. Schmidt protested (220) that "my client is entitled to know what is the claimed liability. * * * I want to have the claimed liability for this

entire period so that I can produce my legal arguments to the claim as made."

Again (216):

"Mr. Schmidt: * * * I can only guide myself by the complaints as they were given to me. The complaints that were given to me concern 1950 and 1951. Is that complaint being construed by the Department as a challenge of the rates paid ever since 1951 to the present date?

Comm'r. Dahmen: Yes, I think that is the law, Mr. Schmidt."

And again (235):

"Mr. Schmidt: Well I would just like to be heard very briefly. If it were as simple as that every employee should simply at the beginning of his employment file a complaint and forever afterwards no other complaint must be made. If he decides to file it in 1950, it applies in 1979. I don't think a law was ever written to cover any such charge. I don't know what they are claiming but the person against whom a claim is made wants to know what is being claimed. *This is the very essence of due process in a hearing.*" (Emphasis ours.)

The ruling of the Hearing Officer throughout was that he would reserve decision on it (138, 185, 216-7, 236, 250, 335). Thereafter both he and the Commissioner expressly rejected Mr. Schmidt's constitutional contentions and determined differentials as to all claimants in all the occupations involved in each year from 1950 to 1963 inclusive (49, 66-71) (Appendices A, B and C hereto annexed).

(3) Obviously the economic facts which would determine the differentials between the wages paid by the Village and the prevailing rate of wages in any one of thirteen years for seventy employees in twenty-seven occupations could and indeed would vary from year to year, precisely as the annual schedules attached to the Hearing Officer's Report abundantly demonstrate (66-69, 176).

In point of fact not one of the annual prevailing rates as found by the Hearing Officer accorded with the 1950 prevailing rate which the 1950 claimants alleged in their filed complaints; and, except in 1950, the wage paid by the Village was progressively in excess of the paid wage which the 1950 claimants alleged in their filed complaints.

Thus Schedule C and Schedule C-1 (66, 67) show that, whereas the prevailing annual rate of wage as found by the Hearing Officer for "Laborer" was $1.344 per hour in 1950, it was $3.029 per hour in 1963,—an increase of 125.37%; and that, according to his findings, the same was substantially true in the other occupations.

Likewise, Schedules D and D-1 (68-9) showed that in the same period the wages paid by the Village, as found by the Hearing Officer, increased from time to time by substantial percentages.

The same four Schedules also show that the findings of the Hearing Officer established very substantial annual differentials in favor of the claimants for the thirteen years and in all occupations (except "automotive mechanics" in a few years), and in consequence purportedly imposed upon the Village an enormous total liability of over $328,000,

exclusive of interest claimed, for the recovery of which by action subdivision 8 of Section 220 of the Labor Law purports to provide.

Whether or not the statutory six months limitation for making determination of the complaint as filed was ordinarily merely "directory", nevertheless a time-lapse of thirteen years converts even a "directory" precept into arbitrary, capricious, oppressive and undue process.

Moreover, and in any event, the subject matter which could lawfully be determined was limited by the filed rate-complaint and by the period of six months limited for determination. Section 220 nowhere authorized, or manifested the slightest intent to authorize, the Industrial Commissioner to enlarge and lengthen in point of time the subject matters to be included in the ultimate determination by the simple expedient of disregarding the limitations of the complaint as filed and of neglecting what the statute expressly required him to do, and thereby to keep accumulating for administrative consideration possible future differentials for as many years as might elapse before he chose to make any determination at all.

Furthermore, even if Section 220 could be distorted into authorizing such blind and arbitrary procedure with such unjust and oppressive consequences, it would itself be a denial of due process of law.

(4) Pertinent are several principles of constitutional law settled by the decisions of this Court.

One is that stated beneath the heading to this Point by way of quotation from *F. T. C.* v. *National Lead Co.*, 352 U. S. 419, 427.

A second is that a statute will not be construed as intending oppressive, arbitrary, unjust or unconstitutional results unless the wording leaves no room for a rational alternative. (*Holy Trinity Church* v. *United States*, 143 U. S. 457, 461; *United States* v. *National Dairy Corp.*, 372 U. S. 29, 32; *Crowell* v. *Benson*, 285 U. S. 22, 62-3.)

A third has been thus formulated by this Court in *Southwestern Tel. Co.* v. *Danaher*, 238 U. S. 482, 489:

> "Of course, it is not open to us to revise the construction placed upon the statute by the state court, but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve."

POINT TWO

The Village was also denied substantive and procedural due process of law by the rulings and determination of the Industrial Commissioner, affirmed by the Appellate Division, that, in the absence of verified complaints for the succeeding years, and in disregard of the Village's demand for *bills of particulars* for those succeeding years, nevertheless successive annual liabilities for annually varying differentials could be adjudged against the Village for each year of the thirteen year period.

When Mr. Schmidt found futile his aforesaid protests against the Hearing Officer's repeated rulings to proceed with testimony as to differentials for as many years as might intervene between the claims filed in 1950 and the indefinite future when the Commissioner might get around to making a determination, Mr. Schmidt turned to demanding that at the very least he receive bills of particulars of the claims for each of such successive years as they had and would come along.

Mr. Schmidt expressly demanded "a bill of particulars to be produced showing what is the claimed liability" "for this entire period so that I can produce my legal arguments" (220). In emphasizing this demand he stressed that a complaint once filed would not and could not run "forever afterwards", particularly with no particulars of what are the future liabilities claimed or the claimed factors relevant to their determination; and that his right to such a bill of particulars, if Section 220 were to be interpreted as open-end authority for indefinite years, was

constitutionally based and *"is the very essence of due process in a hearing"* (235).

Mr. Schmidt's demand was rejected by the claimants' counsel on the somewhat cynical ground that he was "opposed to anything that will delay these proceedings" (235),—proceedings which in fact dragged on for several years more even without a bill of particulars. The Hearing Officer stated: "I will reserve decision" on it (234-6). He never granted it.

The cases cited by the Commissioner in his decision that the six months limitation of time for determination was only "directory" are merely instances under altogether different statutes of lack of statutory promptness in rendering decision. Such cases are in any event beside the point in this case which runs to the indefinite extension and accumulation of differing subject matters over annual periods extending indeterminately beyond the statutory period between the filing of the verified complaint and the time limited by statute for determination thereon.

In the preceding Point we have stressed the distinction between regarding as merely "directory" a time limitation for making decision upon the subject matter in the complaint, and, on the other hand, accumulating subject matters with different factors and circumstances for as many succeeding years as the Industrial Commissioner might cause to elapse before he got around to making any determination at all.

To force upon the Village such blind procedure without either complaint or bill of particulars was, precisely

as Mr. Schmidt said, a violation of "the very essence of due process in a hearing" (235).

The constitutional principles established by the decisions of this Court cited in the preceding Point are even the more applicable here because bills of particulars were the Village's last remaining protections for intelligent and intelligible defenses, as the Hearing Officer leisurely plodded through eleven sessions for thirteen years after the original filing, as to none of which (except the first) did the Village have any means of knowing what annual claims as to facts, issues and law it would be required to respond to and litigate.

We need but quote *Morgan* v. *United States,* 304 U. S. 1, 18:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

POINT THREE

The Village was also denied substantive and procedural due process of law by the rulings and determination of the Industrial Commissioner, affirmed by the Appellate Division, that he had power to adjudge *retroactively* as against the Village annual differential liabilities to fourteen new claimants for a period of over four years prior to the time when the Village was notified that they had filed claims for those years.

On February 20, 1957, over six years after the 1950-1 filing of the 56 claims, 38 new verified complaints, and on April 5, 1957, 22 more new verified complaints were filed with the Commissioner—all in the same verbiage as the 1950 complaints (372, 364, 379, 382). Comparison shows that 14 of these were by *new claimants* (132-3). See Appendix C and accompanying Schedules hereto annexed.

Admittedly, for over four years thereafter no notice of the filing of these verified complaints by fourteen new claimants was given to the Village or its attorney by either the Commissioner or the claimants' attorney (132-5), notwithstanding that Section 220(8) specifically mandated that notice, together with a copy of such complaint, shall be served personally or by mail on any person or corporation affected thereby and further mandated that the Commissioner act "expeditiously" thereon and make determination thereof within this six months after their filing.

Over four years after their filing with the Commissioner the *second* hearing was held, namely on September 7, 1961

(100). Conspicuously no mention was made thereat by the Hearing Officer or the claimants' attorney of any of these additional complaints (100-126). Mr. Schmidt was unaware of them (132-5).

The fact of their filing did not come into the record until the *third* hearing, held over two months later on November 29, 1961 (127, 132-3).

At this third hearing the Hearing Officer explicitly asked Mr. Harold, the claimants' counsel, whether he had ever served the Village "with notice of the additional amount of men and their names and their occupations", and Mr. Harold replied: "No, I have not" (132). He later repeated the admission. To quote (134-5):

> "Comm'r Dahmen: But I would like to clear up that one point at this time, that you (Mr. Harold) did furnish 56 names to the Village but did not furnish the difference between the 56 and the 70 to the Village.
>
> Mr. Harold: That's correct."

At the seventh hearing (July 30, 1962) Mr. Harold put in evidence as Exhibit H-35 a letter by him to the Deputy Industrial Commissioner, dated February 19, 1957, in which he said *inter alia* that he had "today filed 36 new complaints" and that he was "forwarding a copy of it (the letter) to Godfrey Schmidt" (444). No copies of claims were enclosed, and no proof of "forwarding" to Mr. Schmidt was made. Mr. Schmidt's response was (311):

> "I know that I never received it. I never saw it, and the Village authorities here also deny that they ever received or saw it."

The whole objective of subdivisions 7 and 8 of Section 220 was to require expeditious notice and expeditious determination. The knowing delay for over four years by *both* the Commissioner and the claimants' attorney in complying with the statutory requirements was not only a nullification of the statute, but a gross injustice to the Village when later it was taken advantage of to create a liability *retroactively* for over four years during which the Village had no opportunity to consider the claims, prepare defenses or preserve evidence against the erosions and vicissitudes of time.

Nevertheless, the Hearing Officer stated, as he had at the two earlier hearings, that he would proceed to get "all the facts down", and that "we will take arguments later" (138). Mr. Schmidt replied that "we are not assenting in any way to the validity of these things". He also specifically objected again to the renewed ruling of the Hearing Officer that all claims would be regarded in law as running from their first filing "right down to the present date" (136-8).

Again at the fourth, fifth and sixth hearings (all in 1962), Mr. Schmidt renewed his objections and reservations, and was again repeatedly assured by the Hearing Officer that they would be taken into "consideration in reaching my final decision" (159, 185, 216-7, 236, 250, 269, 274, 335). The "final decision" overruled them (35, 39, 44-55). See Appendices A, B and C hereto annexed.

The consequence was a gross unfairness in violation of the very essence of due process of law.

In *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, this Court said (p. 314):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 U. S. 457; *Grannis* v. *Ordean*, 234 U. S. 385; *Priest* v. *Las Vegas*, 232 U. S. 604; *Roller* v. *Holly*, 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean*, *supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller* v. *Holly*, *supra*, and *cf. Goodrich* v. *Ferris*, 214 U. S. 71."

POINT FOUR

The Village was also denied substantive and procedural due process of law by the findings of the Industrial Commissioner, affirmed by the Appellate Division, as to annual prevailing rates of wages in the twelve years after 1950, since such findings were without evidence and mere guesswork, speculation and arbitrary.

In *Interstate Commerce Commission* v. *Louis. & Nashville R. R.*, 227 U. S. 88, this Court held (to quote a headnote):

> "A finding without evidence is arbitrary and useless, and an act of Congress granting authority to any body to make a finding without evidence would be inconsistent with justice and an exercise of arbitrary power condemned by the Constitution."

Subdivision 5a of Section 220 of the Labor Law defined the prevailing rate of wage as "the rate of wage paid in the locality as hereinafter defined to the majority of workmen, laborers and mechanics in the same trade or occupation."

In determining the prevailing rate of wage, the Industrial Commissioner must, as commanded by Subdivisions 5a and 5b of Section 220:

(1) Determine the number of workmen, laborers or mechanics engaged in the same trade or occupation as the claimants in the locality which is defined as the town, village, city or other political subdivision in which the work is being performed;

(2) Determine the rate of wage paid to a majority of them;

(3) If it is determined that there is not a majority paid at the same rate, then the Commissioner must determine the rate paid to the greater number of them;

(4) If such greater number does not constitute at least forty per centum of them, then the Commissioner must determine the average rate paid to such workmen, laborers or mechanics in the same trade or occupation in the locality of the claimants;

(5) If there are no workmen, laborers or mechanics in the same trade or occupation of claimants in the locality, the Commissioner must then follow the aforementioned procedures in the "first larger civil division";

(6) The "first larger civil division" is defined in the following order: "(1) city or village, (2) township, (3) county, (4) the contiguous counties to the county in which the physical work is to be performed."

Here, in rendering his determination of the annual prevailing rates of wage, the Commissioner relied upon a survey conducted by Alfred Capuano, Senior Industrial Wage-Rate Investigator for the Department of Labor, whose crucial exhibits were 1, 2 and 3 (160-234).

During cross-examination, Mr. Capuano admitted that he had not followed the procedures mandated by the statute in conducting this survey.

For example, after being interrogated as to the statutory procedure (204-6), Capuano admitted (206):

> "Q. Now did you follow that procedure in preparing Department's Exhibits 1, 2, 3? A. No. * * * From my experience I didn't see how this could possibly have been done for the nine occupations."

[The Department in making its "investigation" of the twenty-seven claims had arbitrarily telescoped the twenty-seven job classifications into nine titles to save time and money (198-9, 207).]

And later he admitted that for 1950-7 those Exhibits did not show, as to private industry, the number employed in any of "the twenty-seven classifications which are distributed among the twenty-seven complaints filed by Mr. Harold" (209); that the same applied to 1958 to 1961 (210-2); and that the Department did not even have in its files as to many classifications the total number of employees in both public and private employment (211-4).

He also admitted that the Labor Department did not have statistical data on the *rate* paid to the *greater number*

(the statistical "mode") in such trade or occupation. No statistical materials were available to the Industrial Commissioner to determine this statistical mode. Likewise, the Industrial Commissioner did not have, for the period from 1950 through 1957, any reliable statistical materials to determine "40% of the laborers, workmen or mechanics engaged in such trade or occupation" (192-3, 200, 202, 204, 206-217, 221, 226-232, 240). Required private industry wage data were absent (212-213), and he did not know what was the situation in private industry as to job classification (196).

Capuano also admitted that his survey in this case was not "performed in the same manner" as all of his other surveys (194); that, in conducting his survey in this case, he did not use a job description (194); that, although job descriptions were included in his Exhibit 3, they performed no particular function (194); that neither he nor the Labor Department would be in a position to compute the majority in the same trade or occupation for the period 1950 to 1957 inclusive (209, 212); that the Labor Department did not have available the total number of plant operators in public and private industry for 1958 to 1961 inclusive (211); that, in consequence, such data was not included in his Exhibits 1, 2 and 3 (211); and that, with respect to the titles named in the complaints, he could not give the total number of employees in those classifications for the years 1950 to 1961 inclusive (212).

The foregoing are merely some examples of admitted departures from the statutory requirements and standards and of the gross insufficiency of data to comply with them.

The result was permeated with and arrived at by guessing and speculation and therefore outside the statute and clearly unconstitutional as denial of due process. It represented an incursion into "an imaginary world." (*International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 222.)

In *Interstate Commerce Commission* v. *Louis. & Nashville R. R.,* 227 U. S. 88, this Court said (p. 91):

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' *Tang Tun* v. *Edsell,* 223 U. S. 673, 681; *Chin Yoh* v. *United States,* 208 U. S. 8, 13; *Low Wah Suey* v. *Backus,* 225 U. S. 460, 468; *Zakonaite* v. *Wolf,* 226 U. S. 272."

And in the same case this Court further said (p. 93):

> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

In *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, this Court said (p. 288):

> "But a finding without evidence is beyond the power of the Commission. * * * Nothing can be treated as evidence which is not introduced as such. *Interstate Commerce Commission* v. *Louisville & Nashville R.R. Co.*, 227 U. S. 88, 91, 93; *Chicago Junction Case*, 264 U. S. 258."

Conclusion

The petitioner, Village of Port Chester, respectfully prays this Court to issue a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department; and for such other and further reliefs as may be proper.

Respectfully submitted,

CHARLES H. TUTTLE,
Counsel and Attorney for Petitioner,
1 Chase Manhattan Plaza,
New York, New York 10005.

GODFREY P. SCHMIDT,
Also of Counsel,
60 East 42nd Street,
New York, New York 10017.

APPENDICES

Appendix A

Order and Determination of the Industrial Commissioner

THE STATE OF NEW YORK

DEPARTMENT OF LABOR

In the Matter of the Prevailing Wage Claim of LEONARDO COLANGELO, laborer, and other laborers, Direct Village Employees,

Petitioners,

versus

VILLAGE OF PORT CHESTER,

Respondent,

under Section 220, Article 8 of the Labor Law.

This is a proceeding, under Article 8 of the Labor Law, for the determination of the rates of wages prevailing in the same trade or occupation as that of seventy employees in the ungraded Civil Service of the Village of Port Chester who had complained that their employer, the Village, had failed to pay them the prevailing rate of wages required to be paid under said Article 8. It was instituted by the filing on June 19, 1950, of written verified complaints with the New York State Department of Labor.

A Department hearing was held on December 19, 1956, at which the then First Deputy Industrial Commissioner, Charles W. Halloran, presided. An issue of jurisdiction was raised. In a formal order dated March 29, 1957, the then Industrial Commissioner, Isador Lubin, held (1) that the complainants were performing public work governed by Article 8 of the Labor Law, and (2) that the Industrial Commissioner had the power to hear and determine the claims.

Appendix A

At the time of my induction into office as Industrial Commissioner, the issues were still unresolved. I appointed Deputy Industrial Commissioner Ernest A. Dahmen, Jr., to hold hearings and make recommendations with regard to the resolution of the issues raised. After having held nine hearings at which testimony was taken, argument had and exhibits introduced into the record, Deputy Industrial Commissioner Dahmen has submitted a report to me containing his recommendations.

Now, upon all the papers and proceedings had herein, and upon the record of the hearings held and upon the report of the hearing officer, with which I concur, I herewith make the following findings and determinations:

1. That the complainants herein filed valid verified complaints conforming to the requirements of Section 220 of the Labor Law and that in Schedule A, hereto annexed, is a list containing the names of such complainants, together with the dates of filing and payroll titles.
2. That such of the complainants as are listed in Schedule B, hereto annexed, were employed on public work governed by said Section 220, and are entitled to protections afforded by such section.
3. That the various time limitations cited by the Village are inapplicable to this proceeding.
4. That the long delay in this case between filing of complaints and ultimate determination is not attributable to the claimants.
5. That the claim of laches is without merit.
6. That the investigation conducted pursuant to the verified complaints filed herein, including the hearings held, conformed to the requirements of Section 220.

Appendix A

7. That, as a result of such investigation, prevailing rates of wages for the same trade or occupation of the claimants has been determined and are set forth in the Schedule C, annexed hereto.

8. That the tables of rates of hourly wages contained in Schedule C, annexed hereto, are hereby determined to be the rates of hourly wages which prevailed in the same trade or occupation as the claimants herein during the years in issue in this proceeding.

9. That the claimants have been afforded prevailing supplements by the Village.

LET a copy of this order be served by mail on the parties herein.

DATED: Albany, New York
October 3, 1963

M. P. CATHERWOOD
Industrial Commissioner

[Seal]

Appendix A

Notice of Entry

DEPARTMENT OF LABOR

STATE OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that an Order and Determination of the Industrial Commissioner, a true copy of which is annexed hereto, was duly entered in the above-entitled matter in the office of the Industrial Commissioner on the 3rd day of October, 1963.

Yours etc.

M. P. CATHERWOOD
Industrial Commissioner

To:

John Harold, Esq.
Harold, Luca, Persky & Moser
150 Broadway
New York 38, New York

Godfrey P. Schmidt, Esq.
Attorney for Village of Port Chester
60 E. 42 St.
New York, N. Y.

Village Clerk
Village of Port Chester
Port Chester, N. Y.

Appendix B

Decision of the Industrial Commissioner

THE STATE OF NEW YORK

DEPARTMENT OF LABOR

In the Matter of the Prevailing Wage Claim of LEONARDO COLANGELO, laborer, and other laborers, Direct Village Employees,

Petitioners,

versus

VILLAGE OF PORT CHESTER,

Respondent,

under Section 220, Article 8 of the Labor Law.

Facts

On December 19, 1956, in the Office of First Deputy Industrial Commissioner Charles W. Halloran, a conference was held and, at which, J. R. Harold, Esq., representing Leonardo Colangelo et al, direct employee of the Village of Port Chester, and Godfrey P. Schmidt, Esq., representing the Village of Port Chester, were present.

The issue at this conference was the validity of approximately 56 verified wage complaints filed by employees of the Village of Port Chester in which, it is alleged that the hourly wage rate received for the classification of work performed was less than the prevailing hours wage rate for that classification in the locality where the work was

performed. The wage complaints were filed in conformity with Section 220 of Article 8 of the Labor Law. The complaints are dated at various intervals during the years 1950-1952.

During the period 1952-1956, investigations were made by the Department, conferences were held with the Village fathers and with the employees concerned, but at no time was an official order issued by the Department as to the rights of the parties concerned. At the conference of December 19, 1956, conducted by First Deputy Industrial Commissioner Charles W. Halloran, the position of the Department as to the coverage of the affected employees was affirmatively asserted. The attorneys for both sides acknowledged coverage but requested an official opinion as to whether or not the lapse of time between the receipt of the initial complaint and the determination of coverage precluded the employees in question from seeking the relief they sought and precluded the Department of Labor at this time issuing an order and/or determination. It was stipulated by both sides that briefs would be submitted by respective counsel, and that the Department, within three weeks of receipt of said briefs, would issue an opinion as to the question of preclusion in view of the language contained in Subdivision 7 of Section 220 of Article 8 of the Labor Law which reads, in part, as follows:

> "The fiscal officer [in this case the Industrial Commissioner] * * * must on a verified complaint in writing of any person interested, cause an investigation to be made to determine the prevailing rate of wage * * *. * * * Such fiscal officer shall make an order or determination not later than 6 months after filing of such verified complaint."

Appendix B

Question

Whether the failure of the Industrial Commissioner to make a Determination as to the rights of the parties, within six months after the receipt of a verified wage complaint, as set forth in subdivision seven of Section 220 of Article 8 of the Labor Law, bars the said Industrial Commissioner from thereafter making an order and/or determination predicated on said complaint.

POINT I

The provisions for the issuance of an order pursuant to subdivision seven of Section 220 of Article 8 of the Labor Law is directory and not mandatory.

If the provision be mandatory, then the six month period is the latest within which the Industrial Commissioner may make a determination and thereafter he would lose jurisdiction. If, on the other hand, the provision be merely directory, then the Industrial Commissioner would still be empowered to make a determination at any time after he has made the necessary investigation and/or hearing required by the statute.

Where a statute is directory, as distinguished from mandatory, it seeks to establish only an orderly procedure for action, but yet is not so rigid as to bar the official from acting at a date later than the time set out in the statute. (3 Sutherland on Statutory Construction, pg. 107).

Clearly consistent with case law is the holding that the six month provision referred to above is directory and not mandatory.

In the matter of Rochester Gas & Electric Corp. vs. Maltbie, constituting the Public Service Commission, etc., 272 App. Div. 162, the Public Service Commission made an order directing a charge to surplus of certain monies. The utility company filed an application for a rehearing. The

Appendix B

Public Service Law, Section 22 provides that a decision on an application "for a rehearing shall be made within thirty days after the making of such application". The rehearing was granted by the Commission forty days after the filing of such application. The question was whether the Commission was ousted of jurisdiction to grant such a rehearing because of the time fixed by the law. In deciding that the time provisions in the statute was merely directory, the Court said:

> "In the above section (referring to §22 of the Public Service Law above) the following sentence embodies the main question that arises on this appeal, namely: 'The decision of the commission granting or refusing the application for a rehearing shall be made within thirty days after the making of such application.' This sentence when read alone would seem to be mandatory until a study of the authorities has been made which reveals the intention of the Legislature with respect to the duties of an official body or an official as being either directory or mandatory. As a general rule 'public policy, for the convenience and necessity of government,' has much to do in the finding that the minor details of duties imposed upon a public body or public official are directory and not mandatory. (People ex rel. Ruff v. Graves, 277 N. Y. 115, 122). 'The rule with respect to statutory directions to individuals is the opposite of that which obtains with respect to public officers.' (3 Sutherland on Statutory Construction [3d ed.], p. 107.) It is a fundamental principle that the limitation of the time within which a public body is to act does not oust it of jurisdiction to act after the expiration of that time. In this principle the courts have generally concurred. The general rule being that where a public officer is required to perform an official act

within a specified time it will be considered as directory only, 'unless the nature of the act to be performed, or the language used by the legislature, show that the designation of the time was intended as a limitation of the power of the officer.' (People v. Allen, 6 Wend. 486, 487; Matter of Brenner v. Bruckman, 253 App. Div. 607.)"

This rule was similarly applied in the case of Brenner v. Bruckman, Chairman of the State Liquor Authority, 253 App. Div. 607. Here, the Court stated as follows:

"The claim made by petitioner that the State Liquor Authority had lost jurisdiction to revoke petitioner's license because it failed to take such action within thirty days after the hearing of the charges is also without merit. Section 120 of the Alcoholic Beverage Control Law, upon which petitioner relies, provides that a decision shall be rendered within thirty days after the submission or hearing. Such provision is designed to induce a prompt disposition; it is not mandatory but merely directory, and a decision may be compelled after the expiration of thirty days. The State Liquor Authority after such lapse of time is not precluded from thereafter making its determination to revoke a license after a hearing on charges. A provision in a statute which directs an act to be performed by a public officer or body within a certain time is usually given 'for the purpose of securing system, uniformity, and dispatch in the conduct of the public business, rather than for the purpose of making the rights of persons dependent on the doing of the act at the specified time. * * * Especially is this so when the acts are to be done for the benefit of the public, or where there are no negative words in the statute

> forbidding the acts to be done at any other time.' (McKinney's Consolidated Laws of New York book 1, Statutes and Statutory Construction, §7.) In Fallon v. Hatterer (229 App. Div. 397) the court, quoting from another case, stated the rule as follows: 'The general rule most certainly is, that where a statute directs a public officer to do a thing within a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be regarded as merely directory, and not as a limitation upon his authorities.''

See also Warman v. Board of Education, 196 Misc. 267.

A determination made after the six month period provided by the statute, would not be an attempt by the Industrial Commissioner to allocate to himself a power in contravention of the statutory provision. This is necessarily so since the failure to make a determination within the six month period would not operate to relieve the Industrial Commissioner from thereafter making a determination. On the contrary, he would be obliged to make a determination in the proceeding even though the six month period has elapsed, and a failure so to do would entitle an interested party in the proceeding to compel him to make a determination.

POINT II

The six month period contained in the statute is merely the period during which no action in mandamus may be.

In the case of Rochester Gas & Electric Corp. v. Maltbie, 272 App. Div. 162, p. 166, the court said:

> "If the commission is dilatory in rendering its decision on the application for a rehearing, the party aggrieved may resort to a mandamus order to com-

pel a decision. Where a body is vested with power to determine a question of fact, its duty becomes in the nature judicial and it can be compelled to determine the fact, but not directed to decide the particular way. (People ex rel. Francis v. Common Council of City of Troy, 78 N. Y. 33, 39.)

"The appellant apparently is of the impression that if time limitation is held to be directory then mandamus will not lie to compel the commission to act, because it takes the position that an order of mandamus is issued only where there is a clear legal right to be enforced and where there is no adequate or legal remedy to obtain the relief sought. The appellant overlooks the fact that it is not 'time' which mandamus compels, but a decision to be made."

See also:

Trilling vs. Bd. of Education, 190 Misc. 52, 67 N.Y.S. (2nd) 572

Barbenta vs. Bd. of Estimate, 62 N.Y. Supp. (2nd) 424

Donnellan vs. O'Dwyer, 180 Misc. 121, 67 N.Y. Supp. (2nd) 642

Williams vs. Morton, 297 N. Y. 328

Conclusion

The power of the Industrial Commissioner to issue an order and/or determination with respect to the wage complaints filed by the employees of the Village of Port Chester is in no way impaired by the lapse of time since receipt of said wage complaints. It is, therefore, my decision that the work of the complainants comes within the purview of Article 8 of the Labor Law. Such being the case, all parties concerned are notified to act accordingly.

Isador Lubin
Industrial Commissioner

Dated:

Appendix C

Report and Recommendations of Hearing Officer

DEPARTMENT OF LABOR

STATE OF NEW YORK

In the Matter of the Prevailing Wage Claim of LEONARDO COLANGELO, laborer, and other laborers, Direct Village Employees,

Petitioners,

versus

VILLAGE OF PORT CHESTER,

Respondent,

under Section 220, Article 8 of the Labor Law.

To the Hon. M. P. Catherwood, Industrial Commissioner of the State of New York

This is a proceeding, under Article 8 of the Labor Law, for the determination of the rates of wages prevailing in the same trade or occupation as that of a number of employees in the ungraded Civil Service of the Village of Port Chester, who had complained that their employer, the Village, had failed to pay them the required prevailing rate. It was instituted by the filing with the Industrial Commissioner on June 19, 1950, of fifty-four written verified complaints. Two additional wage claims were filed on February 10, 1951.

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The record indicates that, thereafter, the parties made a serious and protracted attempt to settle the dispute. This effort lasted almost five years, during which time the Department stayed its process, awaiting the outcome of negotiations between the parties. In September, 1955, the claimants reported the failure to compromise and requested the Industrial Commissioner to resume processing the claims. Preparations for formal hearings were then made, but the hearings were further delayed by a request from the Village for more time in which to effect a settlement. In April, 1956, further efforts at mutual agreement were abandoned by the claimants.

The first formal hearing was held December 19, 1956, five and one-half years after the complaints were filed. Although most of this time was spent in the attempt at settlement,—an effort characterized by pressure for promptness on the part of the claimants and repeated requests for delay on the part of the Village—the latter interposed the defenses of laches and the statute of limitations.

In a formal order, dated March 29, 1957, the then Industrial Commissioner decided (1) that the claimants' work was public work subject to Article 8 and (2) that the time limitations of Section 220.7 and of Article 78 of the Civil Practice Act were not applicable.

Thirty-six additional claims were filed February 20, 1957; and eleven on April 5, 1957. Thereafter no further petitions were filed.

On January 19, 1959, plans were made for the resumption of formal hearings. The Village again requested a delay.

The hearings were finally resumed on September 7, 1961. In addition to the objections previously raised, the Village set up a claim of failure of due process under the 14th Amendment. It also reiterated its firm intention

not to participate in the proof or contest of genuinely disputable items. At the conclusion of the day's argument, in an effort to proceed regularly with the hearings until a decision was arrived at, a definite date was set for the continuation of the hearing.

The Village then moved in Supreme Court, under Article 78 of the Civil Practice Act, for an order barring the Industrial Commissioner from proceeding further with the hearings, giving as its reasons the contentions previously urged, namely: laches and the time limitation provisions of Article 78, and Section 220 of the Labor Law. Hearings were suspended pending decision of the Supreme Court. The motion was ultimately denied and no appeal was taken.

Hearings were once again resumed, and were continued until the tenth and final hearing was held on March 6, 1963.

Issues

The claims have been vigorously prosecuted and contentiously resisted. A number of issues have been raised.

I

The first issue was that of jurisdiction. Did the Industrial Commissioner have jurisdiction to hear and determine the complaints of failure to pay the prevailing rates of wages? This issue has two prongs:

A. *Were the complainants employed in public work?*

At the first formal hearing held on December 19, 1956, the following dialogue occurred:

> "Commissioner Halloran: I can ask the question now for the record. Is it conceded that these employees in question are covered by Section 220, Article 8 of the Labor Law?
>
> "Mr. Schmidt: I so concede * * *."

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In the formal order of the then Industrial Commissioner, Isador Lubin, dated March 29th, 1957, alluded to above, there is the following statement:

> "It is, therefore, my decision that the work of the complainants comes within the provision of Article 8 of the Labor Law."

B. *Was a verified complaint in writing filed by an interested person?*

No objection was raised to the introduction in evidence of the fifty-six claims filed in 1950 and 1951 by the employees who would be affected by an appropriate decision of the Industrial Commissioner. This in itself would seem sufficient to perfect jurisdiction to hear and determine. Considerable argument was had however over an alleged failure to notify the Village of forty-seven additional claims filed in 1957, yet the Village consented to their introduction into evidence. At least as of the date of the hearing on November 29, 1961, the Village had full notice and knowledge of all claims filed herein. Consequently, all claims are available for investigation and determination.

Objection was also made by the Village that the filings may not have complied with village or local laws, presumably relying on Subdivision 5f of Section 220. Subdivision 5e of Section 220 defines the "fiscal officer" as the Industrial Commissioner, except in the case of a city, where the comptroller or other analogous officer of the city is the fiscal officer. Then follows Subdivision 5f which describes a filing with

> "the fiscal officer of such municipality in accordance with the provisions of the local charter * * * relating generally to the filing of claims * * * against such municipality."

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Read together, it would appear that the intention of these subdivisions was to require compliance with local laws only when the fiscal officer is a local officer, as in the case of a city. Subdivision 5f thus would have no application to a village or other civil division of the State where the Industrial Commissioner is the fiscal officer.

A further claim was raised by the Village that the complainants failed to specify in their complaints the amount claimed to be due them from the Village and that the complaints were, consequently, not sufficient to support the proceedings. It should be noted in this regard that the complainants could not have known at the time of filing what rate of wages the Industrial Commissioner would have determined to be prevailing or that this rate would have exceeded the rate of pay actually received. Subdivision 7 of Section 220 provides for such a determination *after* the filing of a complaint. The complainants could not, consequently, have known at the time of filing how much, if any, would be due them at the termination of these proceedings.

The verified complaints as filed clearly meet the requirements of Section 220.

II

The issue most persistently pressed in the early hearings was the claim that jurisdiction was lost as a consequence of the long delay between the filing of the complaint and resumption of hearings. This contention was made on two grounds: (1) laches and (2) a type of statute of limitations composed of the time limitations expressed in Section 220 of the Labor Law joined with those contained in the Civil Practice Act. I will examine them separately.

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A. *Statute of Limitations*

Essentially this was a claim that Section 220, Subdivision 7, requires a determination within six months after filing of a complaint; that the failure to make a decision is itself a decision reviewable under Article 78 in the time permitted in that Article, namely, four months; and that failure to move for review within four months following the six months period of inaction foreclosed further prosecution of the claims herein.

This contention was examined and rejected by Commissioner Lubin. In the order alluded to above, the Commissioner held that the six months' time limitation contained in Section 220 was directory and not mandatory and in no way deprived the Industrial Commissioner of the authority—and the duty—of processing the present claims through to determination.

The Supreme Court, at Special Term, came to the same conclusion in dismissing an Article 78 proceeding brought by the Village to enjoin the holding of further hearings.

B. *Laches*

This contention is also without merit. The record is replete with instance after instance of effort on the part of the claimants to effect prompt settlement and equally replete with requests for delay on behalf of the Village. The delays in this proceeding cannot, with justice, be charged to the claimants. Furthermore, laches is not available as a defense when the relief sought is a matter of right rather than of discretion. What the claimants are asking the Industrial Commissioner to do—to determine the prevailing rates of wages—is not a matter of discretion. Upon a proper claim being filed, he "must" make an investigation to determine the prevailing rate of wages.

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III

It is the contention of the Village that failure to follow the procedures required by Section 220 when determining a prevailing rate of wages amounts to a denial of due process under the 14th Amendments. Its Counsel stated as follows:

> "Mr. Schmidt: Now, I have another set of objections based upon the statute itself, that is to say the failure to comply with Section 220, and that in turn means failure of the procedural due process under the fourteenth amendment to the United States Constitution, to say nothing of the New York Constitution * * *.
>
> "It is quite impossible at this stage to perform the duties enjoined upon the Industrial Commissioner by Section 220 because the statistics for 1950, and possibly prior to that time, if they are involved, cannot be reconstructed * * *." (Hearings, Sept. 7, 1961, page 5.)

I must, therefore, address my inquiry to the question whether on the record and proceedings had herein, it is possible to reconstruct the wages prevailing during the years in issue.

One phase of this contention is that wage data less than 100% complete is not a permissible foundation for a determination, and that unless the Industrial Commissioner is satisfied that he has wage information on *every* laborer who worked in the locality during the covered period he must refuse—because of lack of power—to make a prevailing wage determination.

Manifestly, such a claim is an invitation to nullification. The purpose of the legislation would surely be

thwarted if a requirement of perfection were introduced into the statute. The Court of Appeals in *Austin* v. *City of New York,* 258 N. Y. 113 (1932), has expressed itself on this point:

> "The statute is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with their workmen. *It is to be interpreted with the degree of liberality essential to the attainment of the end in view.*" (Emphasis supplied.)

It is thus apparent that that which is required is sufficient data of acceptable reliability to enable the Industrial Commissioner to be satisfied that a wage determination based on that data would be a substantial compliance with the purposes and mandate of the law.

IV

Having now determined that the Industrial Commissioner has jurisdiction in the premises it becomes necessary to determine first what work was actually being performed by the claimants. In each of the claims filed the claimants inserted a phrase ("Laborer", "M E O", "skilled laborer", etc.) evidently intended to denote his trade or occupation. All of the claimants are or were in the ungraded Civil Service of the Village of Port Chester employed under a specific title. Job descriptions prepared by the Westchester County Civil Service Commission applicable to job titles in towns and village in Westchester County were received into the record. The Village conceded that these descriptions were presumptively an accurate recital of the work done by the employees working under these titles.

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One claimant, Martin Bucci, testified that his job classification was Motor Equipment Operator, and that the Civil Service job description was accurate. He described the work done by him and others in the same and other job classifications. The Village conceded that the Civil Service job description for his title was an accurate recital of the work done under that title and that further oral testimony matching duties to the other job descriptions would be unnecessary. At the hearing of July 2, 1962, at page 13, this was formalized into a stipulation. In the context that jobs are comparable if there is a substantial similarity of duties, there was testimony to the effect that other job descriptions were an accurate reflection of the duties performed. I have been enable, therefore, to make a determination of the work actually performed by—and consequently the trade or occupation of—the claimants.

The "same trade or occupation" of the claimants having been ascertained, there remained to be decided whether there was sufficient reliable wage data in the record to enable a determination in accordance with Section 220, Subdivision 5, of the prevailing rates of wages.

The record contains

1. A Labor Department survey of other political subdivisions of the county showing

   a. the *number* of their employees in the same title category as the claimants, and

   b. the *wages* paid.

2. Lists of jobs done by private contractors domiciled in the locality.

3. Private wage data for certain categories for years 1958-1961.

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4. Testimony

a. that the private employment sector in the county was 98% unionized;

b. showing what the union rates were between 1950-1961;

c. that the union rates were the wages actually paid.

The one additional item necessary for a prevailing wage determination is the *number* of men in the same trade working in *private* employment in the locality.

On this subject the evidence is incomplete and the Village has claimed that:

> "it is quite impossible at this stage to perform the duties enjoined upon the Industrial Commissioner by Section 220 because the statistics for 1950 * * * cannot be reconstructed * * *."

It is conceded that the precise number of privately employed men working locally in the same trades cannot be determined. I find, however, that the record contains sufficient credible evidence to permit the computation of a substantial proportion of such privately employed men.

1. One employer's representative testified as to the number of employees of his firm who worked in Port Chester during some of the years in question.

2. From the testimony of another employer, the number of his workmen employed in Port Chester can be estimated.

Although it is not known to what extent the number of employees represented by numbers 1 and 2 above is complete, the possibility that this total is incomplete does not

prejudice the village. Wage data is available for a sufficiently large number of private employees in the Port Chester area to indicate that wages in private employment are almost invariably as high or higher than those in Civil Service. This conclusion is confirmed by the experience of the Department of Labor with respect to wages in private and public employment throughout the State. The possible underreckoning of the number of persons privately employed in the Village of Port Chester, therefore, reduces the number of instances when private employment may amount to 40% of the total employment in the Village which would necessitate the higher private employment rate. In situations where no rate is determined to prevail in the Village, an underreckoning would be likely to depress whatever average is obtained by giving disproportionate emphasis to the lower wages normally associated with Civil Service. The allegation of the village regarding the possible inadequacy of the figures relating to the number of men in the same trade working in private employment in the locality does not sustain its objection to a prevailing wage determination.

Computations based on the evidence have been made of the rates prevailing in the trade or occupation of the claimants and are contained in Schedule C annexed hereto.

While recognizing that the final figure so obtained is a reconstructed one, I am of the opinion that it is amply supported by the evidence. To have sustained the contention of the Village that reconstruction was impossible because some data was missing would have

1. introduced into Article 8 a requirement of perfection that would largely vitiate it;

2. penalized the claimants for a delay for which they were not responsible;

3. defeated the legislative purpose of holding the political subdivisions of the state to a "standard of social justice in their dealings with their workmen."

RECOMMENDED FINDINGS

Upon all the evidence adduced in the present proceeding and upon all the papers and documents submitted in connection therewith, I recommend that the following findings be made:

1. That the complainants herein filed valid verified complaints conforming to the requirements of Section 220 of the Labor Law; and that in Schedule A, hereto annexed, is a list containing the names of such complaints, together with the dates of filing and their payroll titles.

2. That such of the complainants as are listed in Schedule B, hereto annexed, were employed on public work governed by said Section 220, and are entitled to the protection afforded by such section.

3. That the various time limitations cited by the Village are inapplicable to this proceeding.

4. That the long delay in this case between filing of complaints and ultimate determination is not attributable to the claimants.

5. That the claim of laches is without merit.

6. That the investigation conducted pursuant to the verified complaints filed herein, including the hearings held, conformed to the requirements of Section 220.

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7. That, as a result of such investigation, prevailing rates of hourly wages for the same trade or occupation of the claimants has been determined, and are set forth in the Schedule C, annexed hereto.

8. That, as a result of such investigation, claimants were afforded prevailing supplements by the Village.

Respectfully submitted,

Ernest A. Dahmen, Jr.
Deputy Industrial Commissioner
for Legislative Affairs
Hearing Officer

Dated: Albany, New York
October 3rd, 1963

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SCHEDULE A

LIST OF CLAIMANTS FILING

Claimant	*Filing Date*	*Payroll Title*
Angiolillo, Angelo	June 19, 1950	Sanitation Man Road Maintainer Skilled Road Maint.
Ballantoni, Francis	February 20, 1957	Motor Equipment Op.
Bates, Edward	June 19, 1950	Automotive Mechanic Park Groundsman
Bochicchio, Anthony	June 19, 1950	Sanitation Man Incinerator Fireman
Bucci, Martin	June 19, 1950	Motor Equipment Operator
Carlson, Helmer	June 19, 1950	Incinerator Fireman
Carlucci, Angelo	June 19, 1950	Incinerator Attendant Incinerator Fireman
Carlucci, Angelo R.	April 5, 1957	Labor Foreman
Carlucci, Anthony	June 19, 1950	Motor Equipment Op. Laborer Road Maintainer
Carlucci, Joseph	June 19, 1950	Incinerator Fireman
Carlucci, Salvatore J.	April 5, 1957	Sanitation Man Motor Equipment Op.
Colangelo, Leonard	June 19, 1950	Sanitation Man Incinerator Attendant
Constantino, Frank	June 19, 1950	Sanitation Man
Delvey, Michael	June 19, 1950	Sanitation Man

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Claimant	*Filing Date*	*Payroll Title*
Ference, John	June 19, 1950	Motor Equipment Op.
Ference, Peter	June 19, 1950	Road Maintainer
Fidelibus, James A.	June 19, 1950	Sanitation Man Laborer Sewage Treatment Plant Op.
Franchella, Rosario	June 19, 1950	Sanitation Man Road Maintainer
Gabriele, Frank	April 5, 1957	Sanitation Man Motor Equipment Op.
Gallagher, John	June 19, 1950	Incinerator Attendant Laborer
Gallagher, Thomas	June 19, 1950	Sewage Treatment Plant Op.
Gazilli, Joseph	April 5, 1957	Sanitation Man
Geronimo, Walter J.	June 19, 1950	Motor Equipment Op.
Girardi, Joseph J.	June 19, 1950	Auto Mechanic Asst. Auto Mechanic Foreman Auto Mechanic
Grieco, Joseph	February 20, 1957	Road Maintainer Motor Equipment Op.
Hirschbeck, John F.	June 19, 1950	Auto Mechanic Foreman Automotive Mechanic
Jacobelli, Vincent	June 19, 1950	Park Groundsman Motor Equipment Op.
Lagano, Antonio	June 19, 1950	Road Maintainer

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Claimant	*Filing Date*	*Payroll Title*
Lowry, Walter	February 10, 1951	Sanitation Man Incinerator Attendant Incinerator Fireman
Marcucilli, Thomas	February 20, 1957	Road Maintainer Laborer Sewage Treatment Plant Op.
Maselli, Vincent	June 19, 1950	Sanitation Man Motor Equipment Op.
Massi, Peter	June 19, 1950	Road Maintainer Motor Equipment Op.
Maturro, Dominick	June 19, 1950	Automotive Mechanic
Mecca, Dominick	February 20, 1957	Sanitation Man
Monterossa, Cosima	June 19, 1950	Sanitation Man Motor Equipment Op.
Morabito, Paul	June 19, 1950	Motor Equipment Op.
Pace, James	June 19, 1950	Motor Equipment Op.
Pace, Nicholas	June 19, 1950	Sanitation Man Motor Equipment Op. Incinerator Fireman
Passarelli, Anthony	June 19, 1950	Road Maintainer Sanitation Man Incinerator Attendant Incinerator Fireman Motor Equipment Op.
Patafio, Salvatore	June 19, 1950	Motor Equipment Op.
Penabare, Anthony	June 19, 1950	Sanitation Man Road Maintainer
Penebere, Peter	April 4, 1957	Auto Mechanic

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Claimant	*Filing Date*	*Payroll Title*
Peters, William	June 19, 1950	Incinerator Fireman Incinerator Attendant Sanitation Man Laborer
Pirrotta, Rocco	April 4, 1957	Auto Mechanic
Pizzarello, Carl	June 19, 1950	Park Groundsman Foreman Park Groundsman
Pizzarello, Nunzio	June 19, 1950	Road Maintainer Skilled Rd. Maint.
Richichi, Anthony	June 19, 1950	Road Maintainer
Romanello, Daniel	June 19, 1950	Road Maintainer Motor Equipment Op.
Romanelli, Dominick	June 19, 1950	Sanitation Man
Romanelli, William	June 19, 1950	Motor Equipment Op. General Repairman
Ruspini, Louis D.	June 19, 1950	Motor Equipment Op. Skilled Road Maint. Motor Equipment Op.
Sabatino, Vincent	June 19, 1950	Sanitation Man Road Maintainer
Salvatore, Joseph	June 19, 1950	Sewage Treatment Plant Op. Grade #3
Sansone, Pasquale	June 19, 1950	Sanitation Man Motor Equipment Op.
Santoro, Frank	February 20, 1957	Sanitation Man
Santoro, Michael	June 19, 1950	Incinerator Fireman Motor Equipment Op.

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Claimant	*Filing Date*	*Payroll Title*
Sapione, James	June 19, 1950	Motor Equipment Op. Incinerator Op.
Sapione, Joseph	February 20, 1957	Skilled Road Maint.
Scheidt, Frank	June 19, 1950	Park Groundsman
Stamboni, Joseph	June 19, 1950	Motor Equipment Op.
Stella, Frank N.	February 20, 1957	Foreman, Road Maint.
Storino, Joseph	June 19, 1950	Motor Equipment Op. Incinerator Foreman
Studwell, Douglas	June 19, 1950	Sewage Plant Op. Grade #3
Summa, James	June 19, 1950	Road Maintainer Motor Equipment Op.
Summa, William	February 20, 1957	Sanitation Man
Tolla, Nicholas	June 19, 1950	Sanitation Man Motor Equipment Op.
Vaccaro, Nicholas	February 10, 1951	Motor Equipment Op.
Vertullo, Anthony	June 19, 1950	Sanitation Man
Zacoagnino, Angelo	June 19, 1950	Road Maintainer Skilled Rd. Maint.
Zanno, Anthony	June 19, 1950	Sanitation Man

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SCHEDULE B

LIST OF CLAIMANTS SUBJECT TO §220

Claimant	*Filing Date*	*Payroll Title*
Angiolillo, Angelo	June 19, 1950	Sanitation Man Road Maintainer Skilled Road Maint.
Ballantoni, Francis	February 20, 1957	Motor Equipment Operator
Bates, Edward	June 19, 1950	Automotive Mechanic Park Groundsman
Bochicchio, Anthony	June 19, 1950	Sanitation Man Incinerator Fireman
Bucci, Martin	June 19, 1950	Motor Equipment Operator
Carlson, Helmer	June 19, 1950	Incinerator Fireman
Carlucci, Angelo	June 19, 1950	Incinerator Attendant Incinerator Fireman
Carlucci, Anthony	June 19, 1950	Motor Equipment Operator Laborer Road Maintainer
Carlucci, Joseph	June 19, 1950	Incinerator Fireman
Carlucci, Salvatore J.	April 5, 1957	Sanitation Man Motor Equipment Operator
Colangelo, Leonard	June 19, 1950	Sanitation Man Incinerator Attendant
Constantino, Frank	June 19, 1950	Sanitation Man

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Claimant	*Filing Date*	*Payroll Title*
Delvey, Michael	June 19, 1950	Sanitation Man
Ference, John	June 19, 1950	Motor Equipment Operator
Ference, Peter	June 19, 1950	Road Maintainer
Fidelibus, James A.	June 19, 1950	Sanitation Man Laborer Sewage Treatment Plant Operator
Franchella, Rosario	June 19, 1950	Sanitation Man Road Maintainer
Gabriele, Frank	April 5, 1957	Sanitation Man Motor Equipment Operator
Gallagher, John	June 19, 1950	Incinerator Attendant Laborer
Gallagher, Thomas	June 19, 1950	Sewage Treatment Plant Operator
Gazilli, Joseph	April 5, 1957	Sanitation Man
Geronimo, Walter J.	June 19, 1950	Motor Equipment Operator
Girardi, Joseph J.	June 19, 1950	Auto Mechanic Asst. Auto Mechanic
Grieco, Joseph	February 20, 1957	Road Maintainer Motor Equipment Operator
Hirschbeck, John F.	June 19, 1950	Auto Mechanic Foreman Automotive Mechanic

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Claimant	*Filing Date*	*Payroll Title*
Jacobelli, Vincent	June 19, 1950	Park Groundsman Motor Equipment Operator
Lagano, Antonio	June 19, 1950	Road Maintainer
Lowry, Walter	February 10, 1951	Sanitation Man Incinerator Attendant Incinerator Fireman
Marcucilli, Thomas	February 20, 1957	Road Maintainer Laborer Sewage Treatment Plant Op.
Maselli, Vincent	June 19, 1950	Sanitation Man Motor Equipment Operator
Massi, Peter	June 19, 1950	Road Maintainer Motor Equipment Operator
Maturro, Dominick	June 19, 1950	Automotive Mechanic
Mecca, Dominick	February 20, 1957	Sanitation Man
Monterossa, Cosima	June 19, 1950	Sanitation Man Motor Equipment Operator
Morabito, Paul	June 19, 1950	Motor Equipment Operator
Pace, James	June 19, 1950	Motor Equipment Operator
Pace, Nicholas	June 19, 1950	Sanitation Man Motor Equipment Operator Incinerator Fireman

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Claimant	*Filing Date*	*Payroll Title*
Passarelli, Anthony	June 19, 1950	Road Maintainer Sanitation Man Incinerator Attendant Incinerator Fireman Motor Equipment Op.
Patafio, Salvatore	June 19, 1950	Motor Equipment Op.
Penabare, Anthony	June 19, 1950	Sanitation Man Road Maintainer
Penebere, Peter	April 4, 1957	Auto Mechanic
Peters, William	June 19, 1950	Incinerator Fireman Incinerator Attendant Sanitation Man Laborer
Pirrotta, Rocco	April 4, 1957	Auto Mechanic
Pizzarello, Carl	June 19, 1950	Park Groundsman Park Groundsman
Pizzarello, Nunzio	June 19, 1950	Road Maintainer Skilled Rd. Maint.
Richichi, Anthony	June 19, 1950	Road Maintainer
Romanello, Daniel	June 19, 1950	Road Maintainer Motor Equipment. Operator
Romanelli, Dominick	June 19, 1950	Sanitation Man
Romanelli, William	June 19, 1950	Motor Equipment Op. General Repairman
Ruspini, Louis D.	June 19, 1950	Motor Equipment Op. Skilled Road Maint. Motor Equipment Op.

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Claimant	*Filing Date*	*Payroll Title*
Sabatino, Vincent	June 19, 1950	Sanitation Man Road Maintainer
Salvatore, Joseph	June 19, 1950	Sewage Treatment Plant Op. Grade #3
Sansone, Pasquale	June 19, 1950	Sanitation Man Motor Equipment Op.
Santoro, Frank	February 20, 1957	Sanitation Man
Santoro, Michael	June 19, 1950	Motor Equipment Op. Incinerator Fireman
Sapione, James	June 19, 1950	Motor Equipment Op. Incinerator Op.
Sapione, Joseph	February 20, 1957	Skilled Road Maint.
Scheidt, Frank	June 19, 1950	Park Groundsman
Stamboni, Joseph	June 19, 1950	Motor Equipment Op.
Storino, Joseph	June 19, 1950	Motor Equipment Op.
Studwell, Douglas	June 19, 1950	Sewage Plant Op. Grade #3
Summa, James	June 19, 1950	Road Maintainer Motor Equipment Op.
Summa, William	February 20, 1957	Sanitation Man
Tolla, Nicholas	June 19, 1950	Sanitation Man Motor Equipment Op.
Vaccaro, Nicholas	February 10, 1951	Motor Equipment Op.
Vertullo, Anthony	June 19, 1950	Sanitation Man
Zacoagnino, Angelo	June 19, 1950	Road Maintainer Skilled Rd. Maint.
Zanno, Anthony	June 19, 1950	Sanitation Man

(SCHEDULE C)

(PREVAILING RATES FOR PORT CHESTER CASE)

Occupation	Public Private or Both	Locality	1961	1960	1959	1958	1957	1956	1955	1954	1953	1952	1951	1950
Laborer: Sanitation Man Park Groundsman Road Maintainer	Both	Township	2.459	2.437	2.251	2.235	2.103	1.945	1.921	1.825	1.703	1.597	1.509	1.344
Automotive Mechanic	Private	Village	2.297	2.28	2.16	2.04	2.04	2.073	2.13	1.986	1.939	1.78	1.715	1.43
Motor Equipment Operator	Private	Village	3.01	2.76	2.5725	2.5725	2.51	2.3775	2.315	2.16	2.0725	2.0725	2.01	2.01
Incinerator Fireman	Public	Township	2.25	2.25	2.08	2.02	1.97	1.92	1.85	1.67	1.63	1.57	1.42	1.08
Plant Operator Sewer	Public	County	2.74	2.48	2.47	2.415	2.305	2.12	2.06	1.885	1.885	1.68	1.69	1.38
Road Maintainer, Skilled	Public	Township	2.529	2.524	2.498	2.434	2.32	2.132	2.11	1.954	1.901	1.784	1.694	1.547

Appendix C

(SCHEDULE C-1)

(PREVAILING RATES FOR PORT CHESTER CASE)

Occupation	Public Private or Both	Locality	1962	1963
Laborer—includes unskilled, common, Road Maintainer, Sanitationman, Park Groundsman, Sewer and Landscape Gardener	Both	Township	2.667	3.029
Incinerator Attendant	Public	Township	2.35	2.50
Incinerator Fireman	Same as Incinerator Attendant			
Automotive Mechanic	Private	Village	2.375	2.536
Motor Equipment Op.	Private	Township	2.84	3.03
Skilled Laborer	Both	Township	2.942	3.206
Plant Operator	Public	County	2.966	3.08

(SCHEDULE D)

(WAGE RATES PAID BY VILLAGE OF PORT CHESTER)

Occupation	1961	1960	1959	1958	1957	1956	1955	1954	1953	1952	1951	1950
Laborer:												
Sanitation Man	2.1575	2.1575	2.1575	2.0575	1.9575	1.8575	1.795	1.7325	1.44⅜	1.44⅜	1.375	1.12
Park Groundsman	2.1575	2.1575	2.1575	2.0575	1.9575	1.8575	1.795	1.7325	1.44⅜	1.44⅜	1.375	1.12
Road Maintainer	2.1575	2.1575	2.1575	2.0575	1.9575	1.8575	1.795	1.7325	1.44⅜	1.44⅜	1.375	1.12
Incinerator Attendant	2.315	2.315	2.315	2.215	2.115	2.015	1.795	1.7325	1.44⅜	1.44⅜	1.50	1.25
Incinerator Fireman	2.315	2.315	2.315	2.215	2.115	2.015	1.9525	1.89	1.575	1.575	1.50	1.25
Automotive Mechanic	2.41⅝	2.41⅝	2.41⅝	2.31⅝	2.30⅜	2.20⅜	2.04¾	2.07⅞	1.65⅜	1.65⅜	1.575	1.31
Motor Equipment Operator	2.315	2.315	2.315	2.215	2.115	2.015	1.9525	1.89	1.575	1.575	1.50	1.25
Road Maintainer, Skilled	2.23⅝	2.23⅝	2.23⅝	2.13⅝	2.03⅝	1.93⅝	1.87⅜	No skilled category this period				
Sewer Plant Operator	2.315	2.315	2.315	2.215	2.115	2.015	1.9525	1.89	1.575	1.575	1.50	1.25

Appendix C

(SCHEDULE D-1)

(Wage Rates Paid by Village of Port Chester)

Occupation	1962	1963
Laborer:		
Sanitationman	2.35	2.493
Park Groundsman	2.35	2.493
Road Maintainer	2.35	2.493
Incinerator Attendant	2.507	2.65
Automotive Mechanic	2.553	2.815
Motor Equipment Opr.	2.507	2.651
Skilled Laborer	2.43	2.572
Sewage Treatment Plant Opr.	2.507	2.65

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(2075)

Supreme Court of the United States

No. 171 October Term, 1965

VILLAGE OF PORT CHESTER,

Petitioner,

against

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, etc.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF IN OPPOSITION TO PETITION

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Counsel for Respondent
The Capitol
Albany, N. Y.

PAXTON BLAIR
Solicitor General

GRACE K. BANOFF
Associate Attorney

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

Supreme Court of the United States

No. 1198—October Term, 1964

VILLAGE OF PORT CHESTER,

Petitioner,

against

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, etc.,

Respondent.

BRIEF IN OPPOSITION TO PETITION

(1)

The petition is filed on behalf of a municipal subdivision of the State of New York, and asserts that the prevailing rate of wage statute of that State (Labor Law, § 220) as construed by respondent has deprived it of property without due process of law.

The petition should be denied upon the authority of *Trenton* v. *New Jersey*, 262 U. S. 182, and *Newark* v. *New Jersey*, 262 U. S. 192. The authority of these cases has never been impaired by subsequent decisions in such a way as to aid the petitioner. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 343. Recent State cases have construed the *Trenton* and *Newark* cases as holding that none of the restraints upon the states stemming from the Fourteenth Amendment is applicable to municipalities. *Monaghan* v. *Armatage*, 218 Minn. 108, 15 N. W. 2d 241, 243, app. dis. 323 U. S. 681; *Wright* v. *Village of South Orange*, 79 N. J. Super. 96, 190 Atl. 2d 675, 678-679; *Marshfield* v. *Cameron*, 24 Wis. 2d 56, 127 N. W. 2d 809, 813.

(2)

No question under the U. S. Constitution was raised in the petitioner's brief in the Appellate Division, Third Department. The five headnotes in that brief are set forth in an Appendix, *infra*, for the information of the Court.

In seeking leave to appeal to the Court of Appeals of the State of New York, the petitioner did not go beyond saying (Motion Papers, p. 38):

> "This four-year delay was not only in making determination but also in giving notice of filing as mandated by the statute. Surely that fundamental requirement of due process was not 'merely directory' (35), or its disregard a ground for *retroactively* mulcting the Village for a four-year period during which it had known nothing about the complaints."

This is clearly inadequate to bring a federal question before this Court. *Daniman* v. *Board of Education*, 348 U. S. 933.

The petition for certiorari should be denied.

Dated: May 26, 1965.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Counsel for Respondent

PAXTON BLAIR
Solicitor General

GRACE K. BANOFF
Associate Attorney

of Counsel

Appendix Showing Points Raised by Petitioner in the Court Below.

Point I—Respondent Industrial Commissioner and his predecessors have failed to perform duties enjoined upon them by Section 220, Article 8, of the Labor Law.

Point II—Respondent Industrial Commissioner and his predecessors have proceeded without, and in excess of, their jurisdiction.

Point III—Respondent Industrial Commissioner's determination of prevailing wages was made in violation of lawful procedure and (a) was affected by error of law; (b) was arbitrary and capricious; and (c) constituted an abuse of respondent's discretion.

Point IV—Respondent's determination was made as a result of hearings at which the evidence taken was, on the entire record, not substantial.

Point V—The Report and Recommendations of the Hearing Officer upon which the Industrial Commissioner indiscriminately predicated his Order and Determination is erroneous in material respects.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 171

IN THE MATTER OF THE APPLICATION

OF

THE VILLAGE OF PORT CHESTER,

Petitioner,

To Review a Determination of

M. P. CATHERWOOD, Industrial Commissioner as to Prevailing Wages of Certain Employees of the VILLAGE OF PORT CHESTER,

Respondent,

MARTIN BUCCI, JOSEPH J. GIARARDI, *et al.*,

Intervenors-Respondents.

INTERVENORS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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MEMBER OF TYPOGRAPHICAL UNION No. 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1198

In the Matter of the Application

of

THE VILLAGE OF PORT CHESTER,

Petitioner,

To Review a Determination of

M. P. CATHERWOOD, Industrial Commissioner as to Prevailing Wages of Certain Employees of the Village of Port Chester,

Respondent,

MARTIN BUCCI, JOSEPH J. GIARARDI, *et al.*,

Intervenors-Respondents.

INTERVENORS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Introduction

Intervenors-Respondents adopt Points I and II of the opposition brief of the Respondent Catherwood, that is (1) that the Village, a municipal subdivision, may not claim Fourteenth Amendment guarantees as against the State; and that (2) no United States constitutional question was raised and decided in the State Court.

In addition Intervenors-Respondents submit that, even assuming a Federal question was raised and decided and such decision necessary to the judgment of the State Court, petitioner has not been denied due process as the record below most clearly illustrates.

POINT I

Petitioner was not denied due process.

Section 220 of the Labor Law permits municipal employees to file "prevailing wage" claims with the Comptroller in the case of Cities and with the State Industrial Commissioner in the case of Towns and Villages. There is no requirement that service of such a claim be also made on the Village. The statutory claim is not the start of a suit against the Village but only a request that the Industrial Commissioner conduct an "investigation" to determine "prevailing wages" (Pet. Br., p. 11, sec. 7).

Notice of the statutory hearings required by the statute was served on the Village which appeared and participated in the proceedings upon which record the Industrial Commissioner determined the comparable "prevailing rate" to which the Village employees were entitled.

These claimes were first filed in 1950 and the determination not rendered until October 3, 1963 (R. 44-77). Essentially the petitioner complains because the hearings were delayed and the claims continued valid. Yet the delay was caused by the petitioner. Both sides sought a settlement and each made appropriate surveys. But each time the employees urged a conclusion or a hearing petitioner would ask for a delay. At one point counsel for the Village agreed the employees figures were correct

and would recomend settlement. (R. 307, Exhibits H-1 to H-40, R. 402-451.)

Petitioner challenged the jurisdiction of the Commissioner in December, 1956, (R. 85). The Commissioner rendered a decision against him in March, 1957, (R. 35-38d) but petitioner did not challenge that decision until 1961 (R. 39-43, 45).

Petitioner asked and asked again for delay for the purpose of settlement, raised legal impediments, but avoided and delayed a Court challenge to such contentions until the last moment and generally delayed and sought to avoid a conclusion (R. 49).

Yet from this delay caused by Petitioner the Village would mount a claim of lack of due process.

It is submitted however that the window of judicial review based upon a claim of lack of due process is a small one with a clearly defined frame.

In the context of this case it may be stated:

> "The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of State regulation and control. A State may regulate the procedure of its Courts in accordance with its own conception of policy and fairness unless it offends some principal of justice ranked as fundamental such as the requirements of hearing and notice or unless it is unreasonable or arbitrary." (16 AM Jur. 2d, Sec. 549, p. 944.)

Thus was there notice and a hearing and was the proceeding generally fair?

It is undisputed that petitioner had notice of the hearing, appeared and participated. The record indicates

witnesses testified and exhibits were put in evidence. Petitioner had ample opportunity to submit evidence in support of its own position but chose not to do so.

A substantial record was made quite adequate to stand against a contention that the Commissioner was arbitrary or capricious (R. 84-457).

It is therefore submitted that there was no lack of due process.

Petitioner's brief rather suggests that it is basically quarreling with the State law and its interpretation by State Courts.

Petitioner contends in its Point I that it was denied "due process" because the Industrial Commissioner and the State Courts construed the State statute providing for hearings within six months as directory and not mandatory and that claims once filed continued "live" until the determination.

Obviously these were State questions resolved by the State in this and other cases.

See also *Cocchiorella* v. *Joseph*, 131 N. Y. S. (2) 247, aff'd 286 A. D. 1076, 146 N. Y. S. 2d 666.

Petitioner in Point II also contends a denial of due process because the complaints were not verified for each succeeding year and because of a claimed disregard of a claimed demand for a bill of particulars.

As indicated under State law a claim once filed remains "live" and there is no requirement to file a new claim each year.

It is to be remembered that the claim under the statutory scheme causes the Industrial Commissioner to conduct an investigation as to the proper wages. The pre-

vailing wage claim is not in the nature of a suit against the Village. The investigation could and did, as to some employee classifications, disclose that wages actually paid were above prevailing wages and no back wages were due. (Automotive mechanic, R. 66-68, 69.)

A supposed need for a bill of particulars is equally without merit. The claim asked for payment of comparable prevailing wages—a duty owned on its own initiative by the Village to its employees. Moreover from the beginning comparable wage data was submitted to the Village, studied by it and counsel for the Village, at record page 307, conceded it was accurate. (R. 299-314, Exhibits H-1 to H-41, R. 409-452.)

The Village in its Point III also argues a denial of due process because it claims the Village did not know about 14 new claims being filed until four years after their filing. Again the claim only asks that an investigation be made and notice to the Village is not required until the hearings. Moreover counsel for the employees testified at the hearing that the Village was in fact notified of these new claims by letter dated February 19, 1957 (R. 310, Exhibit H-35, R. 443).

As a factual matter, although not legally relevant, the Village knew about all the claims (R. 409, 310) and investigated the potential liability long before the hearing date (R. 418, 419, 423, 424).

In its Point Four petitioner argues that the Commissioner's findings were without evidence, and were mere guess work, speculation and arbitrary. Basically however, petitioner is again arguing against the Commissioners discretion, picking excerpts out of context and seeking to run to a desired conclusion.

It is submitted that this Court will not weight the evidence in such a fashion. In terms of fair play witnesses were called, testimony given, exhibits received, petitioner given the full right to cross-examine and submit its own evidence which it chose not to do. There was an abundance of evidence to support the Commissioner's conclusion.

It is submitted that this Court will search the record to see that all were given an opportunity to be heard at the hearing but this Court will not utilize its own slide-rule to see if it might or might not come to the same conclusions as the Industrial Commissioner. The proceedings were not unreasonable or arbitrary.

Petitioner really seeks a review of State law.

CONCLUSION

The petition for certiorari should be denied.

Dated: June 3, 1965.

Respectfully submitted,

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IN THE

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October Term, 1964

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To Review a Determination of
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Prevailing Wages of Certain Employees of the
Village of Port Chester,
Respondent,

Martin Bucci, Joseph J. Giarardi, *et al.*,
Intervenors-Respondents.

REPLY BRIEF FOR PETITIONER, VILLAGE OF PORT CHESTER

The briefs in opposition can be shortly answered.

(1) While it is true that, as a general rule a State may, without regard to ordinary constitutional restrictions applicable in the case of individuals, alter or repeal the charter or governing statutes of any of its municipal subdivisions, the instant issues present no such case.

Here the violations of constitutional rights were in the course of a quasi-judicial and subsequent judicial proceeding, wherein the Village was entitled, like any other litigant, to those elementary principles of fair play and justice which are the essence of due process of law.

The Village is not contending that Section 220 of the New York Labor Law, or any subdivision of it, is unconstitutional. It is contending that in the application of it and in the quasi-judicial proceeding which the Hearing Officer and the Commissioner conducted under it, they violated the constitutional rights of the Village as a defendant and litigant and that their violations equally vitiated the judicial action of the Appellate Division in affirming.

(2) The claim that the constitutional issue was not properly raised below is given color only by ignoring what was actually done.

The petition herein has quoted (pp. 16-20) many specific and extended references to the constitutional issues in the proceedings and hearings before the Hearing Officer, before the Commissioner and before the courts. It also has quoted explicit statements by the Hearing Officer, the Commissioner and the claimants' attorney acknowledging such issues, discussing them, and, in the case of the Hearing Officer and the Commissioner, expressly overruling them.

The petition of the Village for the judicial review which Section 220(8) specifically provided expressly tendered the constitutional issue for decision (18); and this express tender necessarily held good for the Appellate Division and the Court of Appeals.

The Attorney General's brief states that, in seeking leave to appeal to the Court of Appeals, the petitioner "did not go beyond" the one reference to constitutional requirement which it quotes. The Attorney General is wholly mistaken. The denial of due process of law was expressly and explicitly presented as a determining issue on pages 16, 17, 28, 34-5, 36, 38, 40 of the Village's moving papers in the Court of Appeals. As an example of these numerous specifications, over and above the single quotation which the Attorney General acknowledges, we quote a typical specification from page 16:

> "The Commissioner's basic error in interpreting the time limitation in Section 220(7) as operative only as ground for a judicial direction in an Article 78 proceeding, was compounded by his applications of it and by *the consequent denial of due process of law,* with results disastrous to the Village. (Page 28, *post.*)" (Emphasis ours.)

Indeed, this quotation appeared twice,—once in the Index and again as the heading to Point III (p. 28).

One more illustration should suffice,—this from pages 34 and 35 of the Village's moving papers in the State Court of Appeals:

> "In emphasizing this demand (for a bill of particulars) Mr. Schmidt later stressed that a complaint once filed would not and could not run 'forever afterwards', particularly with no particulars of what are the liabilities claimed; and that his right to such a bill of particulars, if Section 220 were to be interpreted as open-end authority for indefinite years, *'is the very essence of due process in a hearing'* (235)." (Emphasis ours.)

(3) The intervenors' brief states (p. 2):

> "There is no requirement that service of such a claim be also made on the Village."

The brief is wholly mistaken. Section 220(8) of the New York Labor Law specifically requires that "before proceeding under a complaint" the Industrial Commissioner "shall give notice" of a hearing, "together with a copy of such complaint", "which notice shall be served personally or by mail on any person or corporation affected thereby".

In the present instance, the Village was the "corporation affected thereby", for a judgment against it was the objective of the claimants and was expressly provided for in Section 220(8).

(4) The intervenors' brief also claims (pp. 2, 3) that the inordinate delay of the Industrial Commissioner for thirteen years beyond the statutory limit of six months was attributable to the Village.

Such claim is also wholly mistaken. See the narrative on pages 14 and 15 of the instant petition and the subsequent Points therein.

In his report dated October 3, 1963, the Hearing Officer conceded that throughout the claims had been "contentiously resisted" (46).

During 1955 and 1956 the claimants themselves made *five written demands* upon the Commissioner to start hearings (428, 429, 431, 434, 438), and they made one more in

1958 (449), and still another in 1959 (451). All were in vain.

In April 1956 the Village sent to the attorney for the claimants (13-15) a letter expressly stating that upon the basis of the opinion and reasoning of its attorney Mr. Godfrey P. Schmidt, the Village does "hereby reject all claims made by and on behalf of the 56" claimants, and is "unwilling * * * to enter into any arrangement for a compromise settlement of any of the claims listed in the enclosed schedule" (14). That schedule appears as Exhibit A annexed to the petition (31-34).

Indeed, even earlier, on September 28, 1955, the attorney for the claimants had himself sent to the Industrial Commissioner and to the Corporation Counsel of the Village a letter stating *inter alia* (428):

> "Please be advised that our efforts to compromise the prevailing wage claims have been unsuccessful. * * * it must now be resolved that such cannot be accomplished.
>
> Accordingly may I ask that you process these claims to a hearing before the Industrial Commissioner."

At no time from the first hearing on December 19, 1956 (84), until the last on March 6, 1963, did Mr. Godfrey Schmidt, attorney for the Village, mention settlement. On the contrary, he strenuously and continuously argued that, because of the delays in setting hearings, the Commissioner had lost jurisdiction, the claims had lost validity and that the procedure being employed was not consonant with due process of law. Mr. Schmidt also stressed by oral

argument and brief that the Commissioner's non-compliance with the claimants' aforesaid written demands for hearings was the equivalent of a determination or refusal within the meaning of Section 220(8), and that the failure of the claimants to seek judicial review of it within the statutory thirty days was a final termination of the proceeding and the claims.

There is not a particle of evidence that there was at any time "a serious and protracted attempt to settle". The letters referred to were, on their face, mere desultory references which never approached anything concrete or active negotiation. To claim that they caused delay for over thirteen years is wholly fantastic.

But Section 220 of the Labor Law renders all such excuses irrelevant. The statute made it the duty of the Commissioner to proceed "expeditiously" in the public interest. It left no room for procrastination or shunting of responsibility to others.

Respectfully submitted,

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Intervenors-Respondents.

INTERVENORS-RESPONDENTS' REPLY BRIEF

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IN THE

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MARTIN BUCCI, JOSEPH J. GIARARDI, *et al.*,

Intervenors-Respondents.

INTERVENORS-RESPONDENTS' REPLY BRIEF

Introduction

It is recognized that it is unusual to file a Respondents' reply brief but Petitioner's purposeful, partial quotation of a pertinent statute could cause the Court to be misled.

The incorrect quotation was not made in petitioner's original brief and thus it could not be caught and answered before. Thus this reply brief is necessary.

POINT I

The prevailing wage claim need not be served on the Village; it only initiates an investigation.

Petitioner's reply brief at page 4 thereof states:

> "(3) The intervenors' brief states (p. 2):
>
> "There is no requirement that service of such a claim be also made on the Village."

The brief is wholly mistaken. Section 220(8) of the New York Labor Law specifically requires that "before proceeding under complaint" the Industrial Commissioner "shall give notice" of a hearing, "together with a copy of such complaint", "which notice shall be served personally or by mail on any person or corporation affected thereby".

It is clear that petitioner wants this Court to believe that the statute requires the "prevailing wage complaint" to be served on the Village.

The statute, section 220(8) New York Labor Law, in fact reads:

> "Before proceeding under a complaint presented as provided in subdivision seven, or before making any order or determination upon an investigation made upon his own initiative, the fiscal officer shall order a hearing thereon at a time and place to be specified, and shall give notice thereof, together with a copy of such complaint or the purpose thereof, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on any person or corporation affected thereby;"

The petitioner improperly excerpted only a portion of the statute seeking to lead the Court to believe that the prevailing wage complaint *must* be served on the Village.

It is clear, however, that when the Industrial Commissioner is to start his hearings he serves a notice of the hearing on the Village together with either (1) a copy of the complaint *or* (2) a statement of the purpose of the hearing *or* a statement of the facts disclosed on such investigation. A simply statement of the purpose of the hearing is sufficient.

Thus there is no requirement that when the claim is served on the Industrial Commissioner it must then also be served on the Village. It is only when notice of the hearing is sent that the Village should be advised of the purpose of the hearing. There is no requirement that a copy of the complaint also *must* be served.

Unfortunately this partial misleading quotation of petitioner was not made in error. The same partial quotation was made in the New York Court of Appeals necessitating the same last minute reply as here.

In conclusion, as stated before, the prevailing rate complaint is not in the nature of a suit against the Village but a request that the State Industrial Commissioner institute an investigation to determine whether "prevailing wages" were paid. In fact, as indicated, the Village did pay more than prevailing wages for auto mechanics for many of the years in review.

In context of the Constitutional question, the Village had notice, an opportunity to be heard and to present its own evidence, and the procedures were not arbitrary or unfair.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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